FEDERAL EQUITY RULES[1]

THE Federal Equity Rules are giving general satisfaction to the bench and bar. As applied by the courts, they are sufficiently flexible to meet the varying local conditions in the different districts. The numerous reported decisions [2] enable an industrious practitioner to ascertain with reasonable accuracy how they are interpreted in most districts.

Where there is lack of uniformity of administration of the rules, it is generally due to the extremely overcrowded condition of court calendars; the ever increasing burdens placed upon federal judges in certain of the districts; the necessity in some districts for a single judge holding one or more terms of court each year in a number of divisions in his district; and to the real or fancied need of disregarding or modifying the rules to meet these conditions.

The large number of conflicting decisions on rules of vital importance indicate that there could be more uniformity of practice under the rules if the Supreme Court should provide some simple and inexpensive way of bringing any rule, concerning which there is conflict of opinion of judges in the same district or in different districts, before it for interpretation or modification. This could probably be done by an additional rule.

At the last meeting of the American Bar Association, Chief Justice Taft made an informal address in support of certain pending bills, providing for additional district judges. These bills as revised [3] provide for an annual meeting, of the Chief Justice of the Supreme Court and the senior circuit judges, for planning or mapping out judicial procedure and thereby introducing "into our

[1] See for earlier treatments of this subject articles by the same author, "One Year under the New Federal Equity Rules," 27 HARV. L. REV. 629; "Working under Federal Equity Rules," 29 HARV. L. REV. 55.—ED.

[2] The new Equity Rules have been interpreted about five hundred times in reported decisions concerning them since their enactment in 1913. (Unreported decisions are more numerous.)

[3] H. R. Bill 9103 passed House Dec. 10, 1921, and now before Senate.

judicial system an executive principle to secure effective team work." If this bill is passed and annual meeting held under it, much may be accomplished in the way of unifying the interpretation of the rules, and in enabling beneficial changes to be made in them. If there is no such legislation, the Chief Justice of the Supreme Court, either directly or through the intermediary of the various courts of appeals, might select a number of lawyers from each circuit having largely to do with federal equity practice, who should confer with the federal judges located in the circuit where they reside and later submit suggestions to the justices of the Supreme Court as to any necessary changes or modifications.

"Most of the preliminary questions arising under these rules never reach the Supreme Court for final determination. It is therefore most desirable that something should be done to require the District Judges to act almost to a mathematical exactness and always in accord, save in those cases where that discretion which is always reposed in the breast of the Chancellor ought to be exercised in the interest of justice." (Judge Carpenter, Chicago.)

A large number of the clerks of the United States circuit courts of appeals and the clerks of the district courts have furnished me much of the data for this article. Such of the federal judges as I have had opportunity to talk with or reach through correspondence have very kindly expressed their views concerning the rules. I heartily appreciate the kindness and courtesy of those busy judges and the clerks of the courts who have interrupted their work and responded to the request for information.

There is a wide variance in practice in different districts under the rules concerning the placing of cases on the calendar; pleadings; evidence to be taken in open court; dismissal of causes of action within the time required by the rules; reference of matters other than accountings to masters; interrogatories, and the preparation of records for appeal.

It is interesting that a very large percentage of the courts approve and heartily endorse the equity rules after nine years of experience with them.[4]

[4] The following are fairly illustrative of what judges say about these rules:

"Generally speaking I think the present equity rules have worked exceedingly well" and regarding "trials in open court, from the experience here we would not go back to the other method. The open court method has resulted in decreased record

The rule requiring equity causes to be tried in "open court" and requiring the court to pass upon the admissibility of all evidence (Rule 46) is generally conceded to be most beneficial, and seems to meet with wide approval by the courts.

Presiding Circuit Judge Baker in a recent unreported decision involving a patent on computing scales, speaking for the Court of Appeals of the Seventh Circuit, expresses in a striking way his approval of the trial of equity cases in open court, which summarizes and epitomizes the statements of many judges concerning the practice, and emphasizes the importance of the change from deposition proofs to the open court trials.[5]

---

in more helpfully shaping the litigation below and in enabling the judge, especially in difficult patent cases, to understand the controversy as it unfolds. It is a highly satisfactory method." (Judge Mayer, C. C. A., 2d Circ.)

"The new Equity Rules have enabled the court to bring suits in equity to hearing promptly and at great reduction of costs. . . . They are a marked improvement in practice over the old rules." (Judge Connor, North Carolina.)

"On the whole I believe the new equity rules are working out well. The simplification of the bill and answer and the abolition of demurrer and plea have produced no unsatisfactory conditions, but on the whole are working out well. One great improvement is the open court hearing." (Judge Westenhaver, Ohio.)

"There is no question that they (the federal equity rules) are of great value." (Judge Hale, Maine.)

"I am impressed with the general efficacy of the Equity Rules and their helpfulness in the administration of justice, both in the simplification of procedure and in the hearings themselves. I am of opinion that the rule requiring the evidence, generally speaking, to be taken and heard in open court is of great benefit." (Judge Sanford, Tennessee.)

"The hearing of cases in open court is a great improvement." (Judge Morton, Massachusetts.)

[5] In The Computing Scale Company *v.* Toledo Computing Scale Company, October Term and Session, 1921 (not yet reported), Judge Baker says (p. 35):

"Under the old rules, the court in reaching the permanent injunction was helpless to control the proofs. Depositions were loaded with hearsay, with immeasurable masses of irrelevant matter, with controversies of counsel, with counsel's directions to witnesses not to answer, with experts' analyses of hundreds of prior patents when six would have been more than enough, with experts' interlarding of their opinions of facts with their opinions of the law of the case, etc., etc. We conjecture that in our clerk's vaults there are tons of paper which were pure waste. We leave it at conjecture because we have no computing scales on which to weigh the more important matters, the clients' exhaustion of patience and resources, the lawyers' mutual infliction of unnecessary labors, and the efforts of the courts to find the three grains of wheat in the bushel of chaff. But those evils are gone. Under the new rules, when the chancellor hears a patent suit as he does other injunction suits in open court, he can and does control the proofs, exclude hearsay and irrelevancies, restrain counsel, compel witnesses to answer proper questions, limit the number of prior patents, and bridle the experts. Records on appeals now show the gratifying difference."

The court in this same opinion criticizes proceedings before masters, the reference to whom under the Federal Equity Rules is being seriously objected to by those having largely to do with federal equity practice. Master proceedings need consideration. This is not because of any misunderstanding of the rules, but because of the abuses in the practice under them. Some federal judges, who express a preference for hearing the evidence, refer cases to masters out of a desire to clear their crowded calendars.

No rules can be devised to eliminate the ever increasing congestion of the dockets of the federal courts in many jurisdictions. Relief must come through the providing of additional judges by legislative enactment.[6]

JUDICIAL INTERPRETATIONS OF THE EQUITY RULES AND ADDITIONAL DISTRICT COURT RULES GOVERNING THE PRACTICE IN DIFFERENT DISTRICTS IN EQUITY CASES

Such decisions on the equity rules as are thought to be most pertinent, which have been rendered since 1913, are cited in the footnotes under the rule to which they relate. Reference is also made to some of the more important additional local rules [7] and regulations adopted by district courts in different districts. The large number of reported decisions prevents a full discussion or digest of them. There is still such divergence in the interpretation of the rules in different districts that attorneys must familiarize themselves with local interpretations of many of the rules, and with the local additional rules made by the courts for the trial of equity causes.

[6] The striking increase in cases filed in the federal courts, and the necessity for additional judges, was well brought out by Senator Spencer, of Missouri, who when speaking on the subject in the United States Senate said that "One of the questions with which we shall soon have to deal seriously is the crowded condition of the dockets of the federal courts." He showed that this is due to the expansion of the country; the growth of business; and all sorts of legislation requiring their attention such as the Sherman Law; the Clayton Act; the Mann Act; the income and excess profits tax laws, and the legislation designed to carry out the Eighteenth Amendment to the Federal Constitution. The printed report of Senator Spencer's remarks contains statistics, taken from the Attorney General's office, showing that the number of new cases brought in the United States district courts was 64,963 in 1916, while in 1921 this number was 104,000.

[7] Adopted under Rule 79.

Rules 1 and 2, Court and Clerk's Office Open; Rule 3, Clerk's Books; Rule 4, Notice of Orders; Rule 5, Motions Grantable of Course; Rule 6, Motion Day. — Rules requiring the District Court and the clerk's office to be always open, and books to be kept by the clerk, notice of orders to be given by the clerk,[8] motions grantable of course by him, and providing for a motion day not less than once each month, have not been strictly adhered to, and counsel cannot rely upon receiving from the clerk notice of orders entered in his absence in all instances, and a great many of the courts have not established any regular motion day.

Rule 7, Process; Rule 8, Enforcement Decrees; Rule 9, Writs of Assistance; Rule 10, Deficiency Decrees; and Rule 11, Process — not Parties. — Rules relating to process, mesne and final; enforcement of final decrees; writs of assistance; deficiency decrees and process in behalf of and against persons not parties, have been liberally interpreted [9] and supplementary proceedings permitted in aid of execution and for supplementary and deficiency decrees.

Rules 12, 13, 14, and 15, Subpœnas, their Issue and Service. — These rules relating to subpœnas, their issue and service, have been before the courts in a number of cases.[10] It has been held that state statutes relating to service are not binding upon the federal courts; [11] that a decree *pro confesso* may not be entered where, after service and before twenty days have run, the suit abates by the bankruptcy of the plaintiff, and no answer in such case is required until a plaintiff has been substituted by order of the court; [12] that no prayer for process is necessary because it is not issued by order of the court, but by the clerk under Rule 12; [13] and that the service of a summons in an action at law in the United States court need not be made by the United States Marshal, Equity Rule 15 applying only to equity causes.[14]

---

[8] 240 Fed. 155 (Conn.). [The names of the cases tabulated are omitted to save space.]

[9] 211 Fed. 172, 180 (Ark.); 218 Fed. 134, 137 (Iowa); 228 Fed. 273 (C. C. A., 5th Circ.); 238 Fed. 938 (Penn.); 239 Fed. 360 (N. Y.); 262 Fed. 918 (C. C. A., 8th Circ.).

[10] N. S. Snyder *et al. v.* Brast Hotel Co. *et al.*, West Virginia, unreported; 204 Fed. 736 (C. C. A., 5th Circ.); 255 Fed. 726 (C. C. A., 8th Circ.).

[11] 255 Fed. 726 (C. C. A., 8th Circ.).

[12] 267 Fed. 550 (C. C. A., 5th Circ.).

[13] 222 Fed. 950 (Penn.).

[14] 223 Fed. 805 (N. Y.).

Rules 16 and 17, Default, Pro Confesso Decrees. — Defaults and decrees *pro confesso* have been discussed in recent cases.[15] The Court of Appeals of the Second Circuit holds under Rule 17 that even though entry of a decree *pro confesso* is not erroneous, the trial court had inherent power to set it aside.[16]

Rule 18, Pleadings; Rule 19, Amendments. — These rules abolishing technical forms of pleadings and authorizing the court to permit amendments or supplementary pleadings at any time have been frequently construed by the courts. While some courts are much stricter than others in regard to amendments, the following show the general tendency.

The Court of Appeals of the Fifth Circuit sent a case back to the trial court and gave plaintiff-appellant leave to amend its bill. Judge Walker said:[17]

"The bill as it was framed was rendered substantially defective by its failure to state facts relied on to support the claims made. It may be that facts exist which are sufficient to support such claims in whole or in part. If so, no harm would result, and it appears probable that it would be in furtherance of justice, to afford to the plaintiff the opportunity to disclose such facts by granting leave to it to amend its bill by making a better statement of the nature of its claim."

Judge Dayton (W. Va.) permitted an amendment to a bill under Rule 19 although the matter introduced was known to plaintiff when the original bill was filed.[18]

Circuit Judge Dodge (Mass.) in permitting an amendment to a bill under Rule 19 to set up additional facts relative to the issue of the patent sued upon, said:[19]

"None of the defects claimed to exist in this bill for infringement of a patent seem to me jurisdictional in the sense contended for by the defendant. If they exist, I cannot regard them as requiring dismissal of the bill without leave to amend in view of equity rule 19."

---

[15] 204 Fed. 736 (C. C. A., 5th Circ.); 267 Fed. 550 (C. C. A., 5th Circ.); 273 Fed. 520 (C. C. A., 2d Circ.).

[16] 273 Fed. 520 (C. C. A., 2d Circ.). See also 267 Fed. 858 (N. Y.).

[17] 238 Fed. 36 (C. C. A., 5th Circ.).

[18] 238 Fed. 980 (West Va.).

[19] 243 Fed. 924 (Mass.).

The court permitted an amendment to a bill brought under the Sherman Act to assert relief under the Clayton Act.[20]

Rule 20, Further and Particular Statement in Pleadings; Rule 21, Scandal and Impertinence.—The recent decisions under these rules are largely cumulative of those referred to in an earlier article in this publication.[21] Some courts adopt the practice of dismissing the bill until a sufficient statement is made by amendment;[22] others order the additional ultimate facts to be stated, including the names and residences of parties intended to be joined as parties plaintiff,[23] and order that unless the amendment is made within a certain time therein named, the bill will be dismissed. Judge Westenhaver has modified the practice theretofore prevailing in the Northern District of Ohio under Rule 20, by holding that opinions or conclusions as to the similarity between the claims of a patent in suit and the machine charged to infringe need not be specified under this rule.[24] The extent to which further and particular statements in pleadings are required is shown by the reported cases.[25] These show that Rule 25 has been considered in connection with Rule 20 and the pleader is generally held to a statement of "ultimate" facts.

Statements of law and argumentative expressions are condemned under the rule relating to scandal and impertinence as illustrated by a recent decision where the Court of Appeals of the Fifth Circuit said:

"The statements of the matters just enumerated were out of place in a pleading, the function of which is to raise or meet issues of law or of

---

[20] 258 Fed. 732 (Mass.). Other cases under Rule 19 are: 206 Fed. 478 (Ill.); 211 Fed. 544 (N. D. Ohio); 206 Fed. 295 (N. Y.); 208 Fed. 378 (Penn.); 208 Fed. 899 (So. Car.); 211 Fed. 544 (N. D. Ohio); 215 Fed. 8 (C. C. A., 9th Circ.); 215 Fed. 1000 (W. D. N. Y.); 208 Fed. 899 (S. Carolina); 235 Fed. 880 (C. C. A., 9th Circ.); 238 Fed. 980 (W. Va.); 238 Fed. 441 (Mass.); 240 Fed. 631 (C. C. A., 5th Circ.); 243 Fed. 924 (Mass.); 249 Fed. 736 (C. C. A., 9th Circ.); 255 Fed. 442 (C. C. A., 1st Circ.); 261 Fed. 714 (Mich.); 264 Fed. 528 (Del.); 271 Fed. 403 (Del.).

[21] 29 HARV. L. REV. 55, 63.

[22] 238 Fed. 36 (C. C. A., 5th Circ.).

[23] 238 Fed. 980 (West Va.).

[24] 243 Fed. 399 (N. D. Ohio).

[25] 205 Fed. 515 (N. Y.); 215 Fed. 1000 (W. D. N. Y.); 217 Fed. 318 (Penn.); 219 Fed. 533 (C. C. A., 2d Circ.); 234 Fed. 127 (Mo.); 238 Fed. 225 (N. Y.); 238 Fed. 980 (W. Va.); 240 Fed. 631 (C. C. A., 5th Circ.); 249 Fed. 502 (Penn.); 225 Fed. 622 (Tenn.); 249 Fed. 538 (C. C. A., 4th Circ.); 251 Fed. 634 (Del.).

fact. Much, if not all, of it could properly have been stricken out as redundant or impertinent matter." [26]

Rule 22, Transfer from Equity to Law Side of Court. — Whenever a suit is erroneously started on the equity side of the court the usual practice of defendants is to move to dismiss the bill, instead of asking to have it transferred to the law side of the court, with the result that a hearing is usually had in which the plaintiff either opposes the motion to dismiss or moves to have the case transferred to the law side. While some trial courts have dismissed such causes instead of transferring to the law side, such courts of appeals as have had occasion to pass on this subject have held that where a plaintiff has an adequate remedy at law and the suit was started in equity, its decision does not require the dismissal of the suit, but merely transfer to the law side.[27] The Court of Appeals of the Fourth Circuit holds that Equity Rule 22 does not authorize a transfer from the law to the equity side of the court.[28]

The Supreme Court of the United States holds, in a case brought on the equity side of the court in the District of Columbia, that the case cannot be transferred to the law side under Rule 22 for the reason that that rule has no application to such a case,[29] and that when a case is transferred to the law side of the court under Rule 22, even though amended at the time of the transfer, such action does not constitute the beginning of a new suit or action.[30] The foregoing but illustrate the many interesting points raised under this rule.[31]

---

[26] 250 Fed. 199 (C. C. A., 5th Circ.).

[27] 225 Fed. 769 (Penn.); 245 Fed. 254 (C. C. A., 5th Circ.); 249 Fed. 415 (C. C. A., 8th Circ.); 250 Fed. 327 (C. C. A., 2d Circ.); 248 Fed. 487 (C. C. A., 8th Circ.); 255 Fed. 806 (C. C. A., 8th Circ.); 268 Fed. 487 (C. C. A., 8th Circ.).

[28] 231 Fed. 654 (C. C. A., 4th Circ.).

[29] 232 U. S. 633.

[30] 247 U. S. 207.

[31] 204 Fed. 299 (Ark.); 205 Fed. 377, 379 (Penn.); 206 Fed. 234 (Oreg.); 206 Fed. 534, 539 (N. C.); 208 Fed. 821 (Utah); 216 Fed. 904, 911 (N. Y.); 216 Fed. 382, 383 (Penn.); 219 Fed. 996 (Ga.); 221 Fed. 178 (C. C. A., 8th Circ.); 221 Fed. 402 (C. C. A., 4th Circ.); 218 Fed. 822 (C. C. A., 5th Circ.); 226 Fed. 653 (C. C. A., 7th Circ.); 227 Fed. 199 (Wis.); 231 Fed. 882 (C. C. A., 8th Circ.); 233 Fed. 329 (Del.); 238 Fed. 782 (C. C. A., 5th Circ.); 239 Fed. 65 (C. C. A., 4th Circ.); 245 Fed. 219 (N. Y.); 251 Fed. 242 (C. C. A., 5th Circ.); 251 Fed. 559 (C. C. A., 1st Circ.); 252 Fed. 144 (C. C. A., 8th Circ.); 256 Fed. 822 (C. C. A., 5th Circ.); 257 Fed. 918 (C. C. A., 6th Circ.); 266 Fed. 145 (C. C. A., 9th Circ.); 272 Fed. 456 (C. C. A., 4th Circ.).

Rule 23, Matters Determinable at Law when Arising in Equity Suit to be Disposed of Therein. — The Act of Congress of March 3, 1915,[32] providing for amendments in pleadings in a case brought on the law side of the court needs to be considered in connection with this rule. The purpose of this Act is well stated by Judge Clayton (Alabama) in a recent case:[33]

"The paramount idea carried in the Act is that courts are established and maintained for the administration of justice, and not to furnish a forum chiefly for the exhibition of the skill of intellectual gladiators — sometimes forgetful of the rights of the parties litigant to have justice administered. So this act, just referred to, provides that if a party has brought his suit at law, whereas it should have been in equity, or vice versa, the cause may, upon application, be transferred to the proper side of the docket, law or equity, as the case may be, the pleadings properly reformed, and the cause proceeded with."

Under this rule it is held that,

"If the issues under the plaintiff's claim are legal issues, they may be sent to a jury to determine at the proper time under Rule 23." [34]

See also the cases cited in the footnote,[35] for variations in the workings of the rule.

Rule 24, Signatures of Counsel. — Treating the signature of counsel as a certificate that there is good ground for the pleading to which his name is signed; that there is no scandalous matter in it; and that it is not interposed for the purposes of delay, has saved considerable annoyance to the practitioner. Circuit Judge Ward says of it:[36]

"The purpose of this rule is to insure good faith. It does not in any respect vary the relation of counsel to client. It does not make counsel who signs the bill a counsel of record, who cannot be changed except on terms, as is the case with the solicitor of record."

---

[32] Section 274, A JUDICIAL CODE; 38 STAT. AT L. 956; 5 FED. STAT. ANNOTATED, 1059.

[33] 235 Fed. 578 (Ala.).

[34] 238 Fed. 225 (N. Y.); 215 Fed. 377 (N. J.); 219 Fed. 266 (Tenn.).

[35] 216 Fed. 382 (Penn.); 221 Fed. 178 (C. C. A., 8th Circ.); 225 Fed. 769 (Penn.); 225 Fed. 293 (Penn.); 233 Fed. 329 (Del.); 248 Fed. 487 (C. C. A., 8th Circ.); 250 Fed. 985 (C. C. A., 5th Circ.); 252 Fed. 144 (C. C. A., 8th Circ.); 257 Fed. 918 (C. C. A., 6th Circ.); 266 Fed. 145 (C. C. A., 9th Circ.).

[36] 222 Fed. 249 (C. C. A., 2d Circ.).

In Massachusetts, Circuit Judge Bingham holds that a defendant is not required to sign his answer individually, nor need it be verified by his oath, nor that of any person in his behalf.[37]

Rule 25, Bill of Complaint. — Previous articles in this publication[38] have fully discussed the rule relating to the contents of a bill of complaint and stated the present situation under it. A recent case, however, has held that a bill not complying with the rules as to conciseness, accuracy, and clearness, will be dismissed until amended.[39]

Letters from a number of federal judges, the clerks of both the courts of appeals and the district court, indicate that this rule has very materially simplified the bill and proved both advantageous and satisfactory. Some of the courts indicate that it is advisable to state the facts fully, but without repetition or prolixity.[40]

Good practice has not been changed by this rule.[41]

There are other cases indicating that too great brevity is inadvisable where speed is desired, while others encourage extreme brevity. An amendment to this rule could easily be made which would materially lessen the prolixity in pleading and reconcile the opinions of the courts concerning what is necessary to be included in the bill of complaint.[42]

---

[37] 238 Fed. 441 (Mass.).

[38] See 27 HARV. L. REV. 634; 29 HARV. L. REV. 69.

[39] 274 Fed. 104 (Del.). See also 205 Fed. 158 (Mich.).

[40] Judge Augustus N. Hand (New York) says: "Under the less technical requirement than formerly of new equity rule 25, it may be unnecessary to pray specifically for relief against infringement to which the facts pleaded would show a right, but it would be safer for the complainant to amend its bill in this respect, though the bill contains a prayer for general relief." Tesla *v.* Marconi, 227 Fed. 903 (N. Y.).

[41] Judge Learned Hand (New York) says: "Since the new rules went into effect, some difference of opinion has arisen. . . . I cannot see that the new rules can have changed the pleading at all. They only incorporate what was the practice of every good pleader before. The equity bar got into verbose habits, but those habits were never proper, except for the fact that, by loading the bill with 'proper charges,' the discovery could be made more specific. It therefore was necessary to put much evidence in the bill. That requirement has been eliminated by the rule, so that the bill is now, what it always ought to have been, a mere pleading, and not a 'charge' of evidence to be answered. But the rules did not and could not change the necessity of a statement by the party having the affirmative, of the 'ultimate facts' on which his right depends. Nevertheless, I hope we shall not return to the old idle verbiage, which incumbered a bill for infringement. Whether we do or not depends upon the instinct of workmanship of the bar." Bayley *v.* Braunstein, 237 Fed. 671 (N. Y.).

[42] 205 Fed. 160 (Wash.); 205 Fed. 158 (Mich.); 205 Fed. 515 (N. Y.); 206 Fed. 736 (N. J.); 206 Fed. 478 (Ill.); 207 Fed. 111 (N. Y.); 215 Fed. 791 (Penn.); 215

Rule 26, Joinder of Causes of Action. — There is apparent conflict as to what causes of action cognizable in equity may be joined in one bill.[43] A short analysis shows the general ruling under this rule. A plaintiff may join a cause of infringement of a patent with an action relative to the cancellation of interfering patents under Revised Statutes 4918.[44] A bill for the foreclosure of two mortgages is not multifarious under Rule 26.[45] The District Court did not abuse its discretion in denying to plaintiff-appellant the right to join the whole dental profession as defendants in one suit under this rule.[46] A bill for unfair competition where diversity of citizenship exists may be properly joined with the charge of infringement of patents.[47] It is no objection to a bill that it joined several causes of action if all are cognizable in equity and are between the same parties.[48] An Ohio citizen sought an injunction against the Governor preventing him from transmitting to the general assembly of the state certain proposed constitutional amendments, and the plaintiff joined as co-plaintiffs all the citizens of the United States. The court dismissing the bill held that Rule 26 did not permit such joinder.[49] Three corporations may be joined as defendants in a suit under the Sherman Anti-trust Act and Clayton Act where the transactions involved related to conducting the same business and were so interwoven that three suits instead of one would cover substantially the same ground.[50] Independent causes of action are not permitted to be joined in one bill of complaint

---

Fed. 1000 (W. D. N. Y.); 218 Fed. 902 (Conn.); 219 Fed. 896 (Ga.); 220 Fed. 174 (N. Y.); 222 Fed. 950 (Penn.); 238 Fed. 980 (West Va.); 241 Fed. 270 (Penn.); 243 Fed. 924 (Mass.); 243 Fed. 399 (Ohio); 232 Fed. 570 (C. C. A., 2d Circ.); 237 Fed. 671 (N. Y.); 245 Fed. 824 (C. C. A., 6th Circ.); 248 Fed. 944 (N. Y.); 249 Fed 502 (Penn.); 262 Fed. 163 (Penn.); 271 Fed. 12 (Del.); 272 Fed. 442 (C. C. A., 3d Circ.); 272 Fed. 821 (C. C. A., 2d Circ.).

[43] In general see: 210 Fed. 687, 688 (N. Y.); 219 Fed. 266 (Tenn.); 205 Fed. 295 (N. Y.); 215 Fed. 377 (N. J.); 219 Fed. 266 (Tenn.); 241 Fed. 129 (Penn.); 241 Fed. 472 (C. C. A., 7th Circ.); 255 Fed. 235 (Penn.); 263 Fed. 437 (N. Y.); 265 Fed. 791 (Penn.); 266 Fed. 546 (Penn.); 269 Fed. 306 (N. Y.); 244 Fed. 463 (Penn.); 272 Fed. 176 (Penn.); 238 U. S. 254.

[44] 227 Fed. 903 (N. Y.).

[45] 233 Fed. 961 (C. C. A., 9th Circ.).

[46] 236 Fed. 544 (C. C. A., 7th Circ.).

[47] 242 Fed. 515 (C. C. A., 2d Circ.).

[48] 244 Fed. 192 (Penn.); 244 Fed. 463 (Penn.); 255 Fed. 235 (Penn.).

[49] 257 Fed. 334 (S. D. Ohio).

[50] 258 Fed. 732 (Mass.).

by different persons having separate and distinct claims against one defendant.[51]

Rule 27, Stockholders' Bill. — A large number of suits have been started under Rule 27, a general discussion of which is entirely outside the scope of the present article. The general doctrine announced in the various decisions under this rule is that a stockholder's bill relates to such bills as are founded on rights which may be properly asserted by the corporation, and does not apply to a bill by a stockholder attempting to assert rights of his own against the corporation, or to enjoin it from doing any illegal act.[52]

Rule 28, Amendments of Bill as of Course. — Amendments to a bill are liberally permitted under this rule. (It has been interpreted in connection with Rules 18 and 19, *supra*.[53])

Rule 29, Defenses — Motions to Dismiss. — The abolishment of demurrers and pleas relieves the practitioner from giving different names to the document by which he proposed to assail pleadings. Motions to dismiss have been used to attack the whole, as well as various parts of bills in equity, and the courts generally encourage their use. The extent to which motions to dismiss have been sustained under this rule by the trial courts and affirmed by the courts of appeals, shows that this reform is valuable in expediting the trial of cases and lessening the cost thereof.[54]

---

[51] 258 Fed. 28 (Conn.); 265 Fed. 791 (Penn.)

[52] 235 U. S. 635; 206 Fed. 736 (N. J.); 218 Fed. 966 (Penn.); 219 Fed. 313 (N. Y.); 237 Fed. 942 (C. C. A., 8th Circ.); 257 Fed. 789 (Del.); 221 Fed. 529 (C. C. A., 6th Circ.); 224 Fed. 254 (Ga.); 225 Fed. 723 (C. C. A., 8th Circ.); 226 Fed. 557 (C. C. A., 4th Circ.); 227 Fed. 337 (C. C. A., 6th Circ.); 235 Fed. 542 (Wash.); 237 Fed. 942 (C. C. A., 8th Circ.); 238 Fed. 980 (West Va.); 243 Fed. 264 (N. D. Ohio); 244 Fed. 61 (C. C. A., 2d Circ.); 249 Fed. 538 (C. C. A., 4th Circ.); 250 Fed. 160 (C. C. A., 6th Circ.); 260 Fed. 396 (C. C. A., 3d Circ.); 259 Fed. 961 (R. I.); 269 Fed. 537 (C. C. A., 8th Circ.); 274 Fed. 326 (C. C. A., 2d Circ.).

[53] 242 Fed. 561 (Ga.); 219 Fed. 719 (C. C. A., 4th Circ.).

[54] 204 Fed. 681 (Me.); 205 Fed. 160 (Wash.); 205 Fed. 515 (N. Y.); 206 Fed. 478 (Ill.); 206 Fed. 736 (N. J.); 207 Fed. 111 (N. Y.); 209 Fed. 717 (Tenn.); 211 Fed. 776 (N. Y.); 212 Fed. 156 (C. C. A., 2d Circ.); 214 Fed. 495 (Penn.); 215 Fed. 791 (Penn.); 215 Fed. 1000 (W. D. N. Y.); 217 Fed. 294 (Penn.); 218 Fed. 902 (Conn.); 218 Fed. 966, 970 (Penn.); 219 Fed. 996 (Ga.); 228 Fed. 174 (N. Y.); 220 Fed. 994 (N. Y.); 225 Fed. 535 (C. C. A., 2d Circ.); also 230 Fed. 449 (C. C. A., 2d Circ.); 222 Fed. 590 (Maine); 225 Fed. 769 (Penn.); 226 Fed. 797 (N. J.); 227 Fed. 1010 (N. J.); 230 Fed. 965 (C. C. A., 8th Circ.); 231 Fed. 183 (N. D. Ohio); affirmed

There are numerous local rules as to motions in different districts which must be looked into whenever a suit is filed. The following are illustrative. In a number of districts a motion will not be considered unless it is accompanied by a brief of authorities in support thereof. In the Western District of Pennsylvania a motion to dismiss may be made by a defendant at the conclusion of the plaintiff's proofs.[55]

These are but illustrative of a number of local rules in different districts made by the district courts under Rule 29.

Rule 30, Answer, Contents, and Counterclaim. — What may be set up in the answer by way of counterclaim has continuously been the subject of judicial debate since the enactment of the Federal Equity Rules. Some judges are adhering to a strict interpretation of this rule, and holding that any affirmative relief asked for in the answer must be germane to or arise out of the original proceedings. The present predominance of opinion, however, permits a defendant to plead in its answer affirmative matters entirely independent of and not in any way arising out of the cause of action set up in the bill.

The numerous and conflicting decisions under this rule,[56] and the controversies arising out of it between different district judges,

246 Fed. 695 (C. C. A., 6th Circ.); 232 Fed. 570 (C. C. A., 2d Circ.); 232 Fed. 95 (C. C. A., 6th Circ.); 233 Fed. 329 (Del.); 233 Fed. 322 (Penn.); 233 Fed. 861 (C. C. A., 8th Circ.); 234 Fed. 191 (Del.); 234 Fed. 375 (Wash.); 235 Fed. 458 (N. J.); 238 Fed. 441 (Mass.); 242 Fed. 951 (N. Y.); 243 Fed. 264 (N. D. Ohio); 240 Fed. 135 (N. Y.); 241 Fed. 875 (C. C. A., 6th Circ.); 241 Fed. 964 (N. Y.); 242 Fed. 809 (C. C. A., 6th Circ.); 242 Fed. 951 (N. Y.); 243 Fed. 405 (Ohio); 244 Fed. 463 (Penn.); 247 Fed. 782 (C. C. A., 1st Circ.); 249 Fed. 538 (C. C. A., 4th Circ.); 250 Fed. 160 (C. C. A., 6th Circ.); 252 Fed. 613 (N. C.); 257 Fed. 445 (Conn.); 260 Fed. 220 (Mich.); 261 Fed. 492 (C. C. A., 8th Circ.); 264 Fed. 589 (Del.); 265 Fed. 572 (C. C. A., 1st Circ.); 265 Fed. 817 (C. C. A., 3d Circ.); 269 Fed. 995 (Minn.); 270 Fed. 593 (Mass.); 273 Fed. 560 (La.).

[55] District Court, Rule 7, Section 1, Western District of Pennsylvania, provides: "If the Judge upon the close of plaintiff's evidence shall be of opinion that the case laid in the bill has not been sustained, and if the answer contains no matter of set-off or counter-claim, he shall have power to enter a decree of dismissal without hearing evidence on behalf of the defendant. Such decree shall have the effect of a non-suit at law, and a refusal of the court, after motion and argument, to change the decree shall be considered a final decree for all purposes."

[56] The following is a citation of cases permitting a defendant to set up by counterclaim matter independent of and not arising out of the cause of action set up in the bill: 208 Fed. 419 (N. Y.); 208 Fed. 156 (Conn.); 208 Fed. 416 (N. J.); 209 Fed. 876 (N. Y.); 212 Fed. 776 (Wash.); 215 Fed. 377 (N. J.); 216 Fed. 186 (Wis.); 217

sometimes in the same circuit, show the necessity for the Supreme Court determining what it means, or so changing it as to make its meaning entirely clear. If the Supreme Court would do this with the few rules on which there is real conflict, tremendous expense to litigants and much time of court and counsel would be saved.

The necessity of remedying this situation is aptly stated in a letter from Judge Carpenter, of the Northern District of Illinois, in a letter of December 20, 1921.

"Much of the time of the judges nowadays is spent in discriminating between opposing decisions of their fellows with reference to the various rules. This really is intolerable. The rules should not be subject to canons of construction. Decided cases tell us that rules of construction are never invoked by the courts when there is nothing to construe. There should be no room for construction as to the equity rules promulgated by the Supreme Court.

For example, Rule 30, as to counter-claim and cross-suit, has been constantly under discussion, and radically different constructions have been applied in different jurisdictions. This is quite wrong. The same is true as to the matter of answering interrogatories under Rule 58."

A recent case announced that if a defendant has a counterclaim arising out of the subject matter of the suit, and fails to assert it in the answer, it is waived.[57]

Rules 31 and 32, Reply, Answer to Amended Bill. — No reply to an answer is necessary unless the answer asserts a set-off or counterclaim. Extensions of the ten days' time for answering counterclaims is usually granted by the courts upon proper showing. The rule as to answers to amended bills has provoked little discussion.

Fed. 91 (Ill.); 222 Fed. 528 (Idaho); 232 Fed. 609 (N. Y.); 233 Fed. 322 (Penn.); 234 Fed. 868 (C. C. A., 7th Circ.); 237 Fed. 646 (N. Y.); 244 Fed. 192 (Penn.); 245 Fed. 556 (C. C. A., 6th Circ.); 247 Fed. 200 (Mich.); 247 Fed. 256 (C. C. A., 2d Circ.); 257 Fed. 918 (C. C. A., 6th Circ.); 274 Fed. 275 (C. C. A., 6th Circ.).

The following is a citation of cases holding that affirmative relief sought by counterclaim must be germane to or arise out of the original proceedings: 204 Fed. 103 (Mass.); 205 Fed. 375 (N. Y.); 206 Fed. 295 (N. Y.); 208 Fed. 566 (Wis.); 210 Fed. 347 (Wis.); 207 Fed. 111 (N. Y.); 212 Fed. 452 (Mass.); 214 Fed. 841 (Conn.); 223 Fed. 316 (C. C. A., 8th Circ.); 227 Fed. 378 (C. C. A., 8th Circ.); 230 Fed. 518 (Conn.); 235 Fed. 531 (Mass.); 235 Fed. 898 (Penn.); 243 Fed. 629 (Ohio); 250 Fed. 985 (C. C. A., 5th Circ.); 251 Fed. 1 (C. C. A., 6th Circ.).

[57] 251 Fed. 1 (C. C. A., 6th Circ.); see also 221 Fed. 669 (Ohio); 239 Fed. 484 (Iowa); 232 Fed. 470 (Penn.); 222 Fed. 950 (Penn.); 243 Fed. 405 (Ohio); 243 Fed. 157 (C. C. A., 4th Circ.); 267 Fed. 435 (Mo.); 273 Fed. 67 (C. C. A., 2d Circ.); 271 Fed. 226 (C. C. A., 6th Circ.); 268 Fed. 985 (Fla.).

Courts are lenient in granting extensions of time prescribed for filing these.[58]

Rule 33, Testing Sufficiency of Defense; Rule 34, Supplemental Pleadings; Rule 35, Bills of Revivor, and Supplemental Bills; Rule 36, Officers before Whom Pleadings are Verified. — There has been little difficulty in the interpretation of any of these rules. Decisions as to the testing of sufficiency of defense [59] are quite consistent with each other. The scope of supplemental pleadings has been defined,[60] the courts holding that if plaintiff's original bill is sufficient to entitle him to one kind of relief, and facts subsequently occur to entitle him to other and more extensive relief, he may have it by setting up the new matter in the form of a supplemental bill, even though the nature of the suit would in effect be changed thereby.

Rule 37, Parties Generally — Intervention; Rule 38, Representative of Class; Rule 39, Absence of Persons who Would Be Proper Parties; Rule 40, Nominal Parties; Rule 41, Suits to Execute Trusts of Will; Rule 42, Joint and Several Demands; Rules 43 and 44, Defect of Parties; Rule 45, Death of Party — Revivor. — Courts exercise wide discretion under these rules. Under Rule 37 the court is liberal in permitting intervention [61] and permits the manufacturer of an article to intervene in a suit against his dealer for alleged infringement of patent by the article.

The interpretation of Rule 38 has caused little difficulty,[62] and

---

[58] 250 U. S. 39; 208 Fed. 566 (Wis.); 229 Fed. 702 (C. C. A., 5th Circ.); 230 Fed. 514 (Conn.); 235 Fed. 898 (Penn.); 237 Fed. 484 (Iowa); 249 Fed. 296 (C. C. A., 2d Circ.); 268 Fed. 985 (Fla.); 215 Fed. 377 (N. J.); 268 Fed. 887 (Penn.).

[59] 214 Fed. 841 (Conn.); 229 Fed. 702 (C. C. A., 5th Circ.); 233 Fed. 322 (Penn.); 233 Fed. 470 (Penn.); 237 Fed. 484 (Iowa); 243 Fed. 399 (N. D. Ohio); 268 Fed. 985 (Fla.).

[60] Federal Equity Rule 34. See 204 Fed. 103 (Mass.); 206 Fed. 295 (N. Y.); 211 Fed. 544 (Ohio); 211 Fed. 544 (N. D. Ohio); 216 Fed. 267 (Penn.); 235 Fed. 719 (Wash.); 250 Fed. 160 (C. C. A., 6th Circ.); 264 Fed. 528 (Del.).

[61] 210 Fed. 347 (Wis.); 208 Fed. 378 (Penn.); 228 Fed. 895 (C. C. A., 2d Circ.); 229 Fed. 297 (N. Y.); 231 Fed. 292 (Cal.); 231 Fed. 571 (C. C. A., 9th Circ.); 231 Fed. 950 (C. C. A., 6th Circ.); 242 Fed. 561 (Ga.); 252 Fed. 965 (C. C. A., 8th Circ.); 255 Fed. 235 (Penn.); 256 Fed. 238 (N. Y.); 256 Fed. 714; 261 Fed. 646; 262 Fed. 56 (C. C. A., 9th Circ.); 264 Fed. 340 (N. C.); 266 Fed. 828 (C. C. A., 8th Circ.); 269 Fed. 796 (Del.). *Contra*, 274 Fed. 487 (Del.); 255 U. S. 356.

[62] 208 Fed. 605 (Wash.); 240 U. S. 369; 219 Fed. 273 (Ariz.); 219 Fed. 719 (C. C. A., 4th Circ.); 231 Fed. 292 (Cal.); 231 Fed. 521 (Ga.); 233 Fed. 1010 (Ga.); 230 Fed. 702 (Mich.); 237 Fed. 219 (Del.); 253 Fed. 246 (Fla.); 257 Fed. 334 (S. D. Ohio); 264 Fed. 247 (Ind.); 271 Fed. 12 (Del.); 231 U. S. 646, 248 U. S. 215.

it has been held that as the Constitution gives the federal court jurisdiction involving non-federal cases only when the parties are of diverse citizenship, its jurisdiction on behalf of this class is limited to instances where the parties reside in different states. The court has held jurisdiction of suits in which there was an absence of persons who would be proper parties.[63]

The other rules under this heading, except that as to revivor,[64] have provoked no particular discussion. Under the latter rule, the Supreme Court has held that a substitution formerly effected by a bill of revivor or a bill of that nature, may now be ordered by motion under new Equity Rule 45.[65]

Rule 46, Trial — Testimony Taken in Open Court; Rule 47, Depositions — To be Taken in Exceptional Cases. — Judges quite generally agree that a great saving and many advantageous results are obtained by strict adherence to the rule compelling witnesses to testify in open court, and where that practice is pursued much favorable comment is made concerning it. A number of courts, however, refer cases to masters for their findings of fact and conclusions of law on the evidence adduced before such masters. Other courts permit depositions to be taken of witnesses who reside within one hundred miles of the place of trial and could be compelled to testify in open court, and in effect treat most equity cases as "exceptional" if the counsel for the litigants agree to such procedure. Even these courts which permit such reference to a master will usually, on the insistance of either party, require such witnesses as can be reached, to be examined before it. In some districts the courts strictly enforce the rule that testimony of all witnesses within the reach of subpœnas be given in open

[63] 204 Fed. 681 (Me.); 231 Fed. 521 (Oreg.); 233 Fed. 1010 (Ga.); 243 Fed. 621 (R. I.); 247 Fed. 256 (C. C. A., 2d Circ.); 249 Fed. 538 (C. C. A., 4th Circ.); 252 Fed. 248 (Oreg.); 257 Fed. 69 (C. C. A., 3d Circ.); 264 Fed. 247 (Ind.); 264 Fed. 546 (N. C.).

[64] Circuit Judge Hough (then District Judge) has pointed out the efficacy of this rule as follows: "Prior to the passage of this rule the opinion was widely entertained that there was no method of reviving an equity suit, except by bill of revivor. . . . Bills of revivor are cumbrous survivals of antiquity and in my judgment rule 45 was intended to regulate the method of penalizing a failure to revive; *i. e.*, to make simple motions applicable to both contingencies." Spring *v.* Webb, 227 Fed. 481 (1915); 267 Fed. 551 (C. C. A., 5th Circ.).

[65] 246 U. S. 128; 227 Fed. 481 (Vt.); 223 Fed. 41 (C. C. A., 8th Circ.); 222 Fed. 950 (Penn.); 255 Fed. 235 (Penn.).

court, as the judges indicate that they prefer to hear and see the witnesses on the stand and that they benefit by such procedure.[66]

In some districts the courts will not recognize agreements to take any evidence which can be taken in open court in other manner.

The unreported decisions on these rules are more numerous than those reported.[67]

The question has been raised as to whether the statutory right to take depositions *de bene esse* is regulated by the new Equity Rules. It seems clear that Rules 46 and 47 have to do only with situations where the Revised Statutes 863–867 do not apply, and are merely regulatory as to the matter of time of taking depositions under the statutes. Indeed, Rule 54 seems to indicate the absolute statutory right to take these depositions within the times prescribed by the rules.[68]

Rule 48, Testimony of Expert Witnesses. — The rule permitting the court to order that the testimony in chief of expert witnesses, directed to matters of opinion as to the validity or scope of patent or trade-mark, be set forth in affidavits and filed, is not extensively used. In fact, long expert depositions are becoming very much

---

[66] Judge Rose (Maryland), in order to hear witnesses orally, occasionally sits in advance of the trial to take the evidence of some witness who may not be available at the time of trial.

[67] Rule 46: 207 Fed. 247 (C. C. A., 5th Circ.); 211 Fed. 544 (Ohio); 226 Fed. 202 (C. C. A., 7th Circ.); 236 Fed. 481 (C. C. A., 8th Circ.); 243 Fed. 1001 (Fla.); 244 Fed. 836 (Ga.); 270 Fed. 546 (C. C. A., 7th Circ.); 270 Fed. 388 (C. C. A., 9th Circ.). Rule 47: 203 Fed. 591 (N. Y.); 216 Fed. 634 (Ill.); 221 Fed. 676 (N. Y.); 227 Fed. 1004 (N. Y.); 243 Fed. 362 (C. C. A., 1st Circ.); 243 Fed. 1001 (Fla.); 243 Fed. 783 (N. Y.); 243 Fed. 775 (N. J.); 245 Fed. 783 (N. J.); 252 Fed. 397 (C. C. A., 9th Circ.); 274 Fed. 56 (C. C. A., 6th Circ.); 221 Fed. 676 (S. D. N. Y.).

[68] Former District (now Circuit) Judge Mayer, after conferring with his associates, Judge Hough, Judge Learned Hand and Judge Augustus Hand, says concerning this rule: "Finally, I am asked to pass upon a question of practice in respect of which it is said the members of the bar are somewhat in doubt. The defendant objected to the admission in evidence of certain depositions taken by plaintiff without first obtaining leave of court. These depositions were taken under section 863 of the Revised Statutes of the United States, and apparently within the time provided by equity rule 47, . . . but without an order of court. I am of opinion that equity rule 47 was not intended to vary or be a limitation upon section 863, because, of course, that section, being a legislative enactment, cannot be changed except by further legislative enactment." Iowa Washing Machine Co. *v.* Montgomery Ward & Co., 227 Fed. 1004, 1007.

less frequent in such cases than formerly. At the present time, expert testimony is largely given on the witness stand and is materially shortened thereby. Many of the federal judges are attempting to correct the abuse of the use of experts which grew to abnormal porportions under the old rules, where counsel asked questions the answers to which might last for many days. The growing disposition on the part of courts to limit expert testimony is strikingly noticeable.[69]

Rules 49, 50, 51, 52, 53, 54, and 55. — These rules relate to the taking of evidence and securing the attendance of witnesses before masters, examiners, and stenographers, and to the filing of this evidence, and are largely restatements of previous rules.[70] Operation under them appears to be clearly understood.

Rule 56, Trial Calendar; Rule 57, Continuances. — The rules requiring a case to be placed upon the trial calendar, after the time has elapsed for taking depositions, and continued only in "exceptional cases" by order of court upon proper showing, are administered with little uniformity.[71] Pressure of numerous urgent cases on both the law and equity sides of the court requires that the hearing of less urgent ones be postponed. There are many other reasons preventing judges from enforcing these rules strictly. My own experience and the widely varied statements from clerks as to the constantly changing practice under these rules to meet the exigencies of court calendars in nearly every district, makes any statement concerning practice under them of little value. In order to know what is necessary to be done in any pending case, it is imperative to keep fully informed of the local situation. The following instances are sufficiently illustrative.

The clerk of the Southern District of Ohio reports that in his district, cases are placed on the trial calendar when at issue; that

---

[69] 203 Fed. 591 (N. Y.); 206 Fed. 478 (Ill.); 216 Fed. 634 (Ill.); 217 Fed. 320 (Penn.); 243 Fed. 399 (N. D. Ohio); also many unreported cases.

[70] Rule 50: 245 Fed. 636 (C. C. A., 2d Circ.); Rule 51: 229 Fed. 579 (Penn.); Rule 54: 203 Fed. 591 (N. Y.); 221 Fed. 676 (N. Y.); Rule 55: 232 Fed. 784 (Vt.).

[71] Rule 56: 216 Fed. 1 (C. C. A., 8th Circ.); 217 Fed. 175 (N. Y.); 243 Fed. 775 (N. J.); 243 Fed. 362 (C. C. A., 1st Circ.); 245 Fed. 783 (N. J.); 274 Fed. 56 (C. C. A., 6th Circ.). Rule 57: 229 Fed. 633 (C. C. A., 4th Circ.); 243 Fed. 362 (C. C. A., 1st Circ.); 270 Fed. 289 (Ga.); 274 Fed. 56 (C. C. A., 6th Circ.); 271 Fed. 284 (C. C. A., 3d Circ.).

equity cases are disposed of promptly, and that the equity calendar is up to date.

In the District of Maryland, the court calls the equity docket about every three months, and insists upon assigning for trial every case that is then at issue.

In the Middle District of Tennessee, when neither party takes depositions the case goes on the trial calendar ninety days after the case is at issue.

In Montana, cases are placed on the calendar as soon as issue is joined.

In many jurisdictions these rules are not observed, and in such districts cases are set at the convenience of court and counsel.

In South Dakota, equity cases go upon the calendar at the term of court following the filing thereof, without notice, and if the case is not prosecuted for three terms, the practice is to dismiss the suit.

In the Northern District of Iowa, a local rule requires a trial notice in equity cases, but this practice is not uniformly carried out there.

In the Northern District of Georgia, the clerk says that the large number of law cases as compared with those filed on the equity side of the court

"has prevented the making of a calendar of equity cases. The present practice of the court is that counsel desiring an equity case heard, has such case placed on the calendar for some Saturday, after notice to opposing counsel . . . and the court devotes each Saturday to hearing equity cases and motions."

In Oregon, equity cases are set specially and hence caused

"to be tried more promptly than they would be under the equity rules."

In the Northern District of Ohio and the Southern District of New York, it is necessary, in order to take depositions under the rules, to file notice of intention to take them within twenty days after the case is at issue.

Rule 58, Interrogatories — Discovery. — There have been many controversies over the enforcement of this rule. In some instances quite as much time of the court has been taken in hearing arguments concerning interrogatories and deciding what should or should not be answered, as is occupied in the actual trial of the

case. This is evidenced by the numerous unreported and reported decisions thereon.[72] The difficulty with practice under this rule is well expressed in a letter from Judge Killits, of the Northern District of Ohio, in which he says:

"I have a horror of controversies over interrogatories, especially in intricate equity cases, and it requires the court to dip into the merits of the case several times. I believe that some modification of this rule in the direction of clarity and limitation is highly advisable."

Some courts compel discovery of wide scope under this rule; others restrict it to facts and documents clearly material to the "support or defense of the case." One great difficulty, aside from the contention that usually arises whenever interrogatories of any real scope are filed, is the fact that the answers are usually so evasive and indirect as to be of little value. Interrogatories seem to be more generally used for "fishing expeditions" than definitely to establish facts.

Rules 59 to 68, inclusive, Reference to and Proceedings before Masters. — The only substantial change in the rules regulating master proceedings is the first paragraph of Rule 59, which provides that

"save in matters of account, a reference to a master *shall be the exception*, not the rule, and shall be made only upon a showing that *some exceptional condition* requires it."

This change was made to bring all procedure under the rules in line with the rules requiring equity causes to be tried in open court. Under the old rules some cases were referred to masters for a complete decision of the case, subject to review only by exceptions to

[72] 211 Fed. 338 (C. C. A., 7th Circ.); 216 Fed. 634 (Ill.); 217 Fed. 319 (Penn.); 221 Fed. 424 (Penn.); 221 Fed. 430 (Penn.); 222 Fed. 950 (Penn.); 225 Fed. 622 (Tenn.); 227 Fed. 948 (N. Y.); 229 Fed. 833 (Penn.); 231 Fed. 557 (N. Y.); 231 Fed. 998 (N. Y.); 232 Fed. 617 (R. I.); 233 Fed. 470 (Penn.); 234 Fed. 194 (Del.); 235 Fed. 300 (N. Y.); 235 Fed. 224 (Mass.); 235 Fed. 300 (N. Y.); 236 Fed. 544 (C. C. A., 7th Circ.); 238 Fed. 441 and 444 (Mass.); 238 Fed. 925 (Mich.); 239 Fed. 539 (C. C. A., 7th Circ.); 240 Fed. 135 (N. Y.); 241 Fed. 964 (N. Y.); 243 Fed. 399 (Ohio); 244 Fed. 825 (N. J.); 245 Fed. 603 (C. C. A., 6th Circ.); 245 Fed. 824 (C. C. A., 6th Circ.); 246 Fed. 603 (C. C. A., 6th Circ.); 247 Fed. 351 (Ill.); 248 Fed. 956 (N. Y.); 259 Fed. 597 (Cal.); 268 Fed. 205 (N. Y.); 275 Fed. 590 (Del.); 275 Fed. 624 (Cal.).

such decision. That this was never the intention of the old rules is apparent from an early Supreme Court decision.[73]

Some courts seem to disregard the change in Rule 59 and treat many cases as "exceptional" and require very little showing concerning this "condition" in referring cases, other than in matters of account, to masters.

The reference to a master has long been an inseparable adjunct of equity procedure, and has imposed ever increasing burdens and expense upon litigants. Abnormal records are frequently made before masters because of the practice of receiving substantially all testimony offered, whether material, relevant, competent or not. Masters are paid directly by the litigants and in many instances their compensation is necessarily out of all proportion to the costs in proceedings directly before the court. It frequently happens that the compensation of masters is much in excess of the judges who appoint them. It is extremely difficult to explain to contending parties why they should be required to pay directly the large charges necessarily made by masters when the courts are maintained and the judges paid by the government. There is always the feeling among litigants that masters' bills must be paid promptly as presented, for fear that otherwise their rights might be prejudiced. This causes an unwarranted reflection on the courts, and is detrimental to the judicial system.

Presiding Judge Baker, of the Court of Appeals of the Seventh Circuit, has recently pointed out some of these abuses before masters.[74]

---

[73] In Kimberly *v.* Arms, 129 U. S. 512, 524, Justice Field says: "It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers."

[74] In Computing Scale Co. *v.* Toledo Computing Scale Co., not yet reported, C. C. A., 7th Circuit, 1921: "But when it comes to rendering the money decree on a master's report, with attached evidence, counsel seem to be yet at large. Frequently they toy with the master pretty much as they did with the notaries before whom they took the depositions for use at the hearing of the merits of the bill. . . . Imagine a law court, with the single issue before it of damages for established or conceded trespasses, or the value of property wrongfully appropriated, or the value of property about to be lawfully appropriated (a condemnation case), permitting the parties to engage the attention of a jury for five years. We are not noting this case as being exceptionally Jarndyce; we are merely taking it as a text in speaking of a general situation."

These rules governing master proceedings should be given careful consideration with the view of either eliminating or radically changing them. If cases are to be referred to masters, their compensation should be fixed by statute and paid by the government in the same manner that the federal judges are paid. Many references to masters could be avoided if there were a sufficient number of federal judges to keep up with the work imposed upon them.

The decisions under these rules require no discussion.[75]

Rule 69, Petition for Rehearing; Rule 70, Suits by or Against Incompetents. — Rule 69 has been discussed in at least three reported cases.[76]

Rules 71 and 72, Form of Decree and Correction of Mistakes in Orders and Decrees. — The reported and unreported decisions under these rules relate to the procedure under them.[77]

Rule 73, Preliminary Injunction and Restraining Orders; Rule 74, Injunction Pending Appeal. — Temporary restraining orders have been granted under these rules without notice in some instances where it appears that immediate and irreparable loss or damage would result to the applicant before the matter could be heard on notice, and in many instances injunctions pending appeal have been suspended upon terms by the court who decided the case.[78]

---

[75] Rule 59: 211 Fed. 751 (Me.); 234 Fed. 952 (Penn.); 238 Fed. 948 (Penn.); 243 Fed. 1003 (Fla.); 244 Fed. 980 (Penn.); 245 Fed. 354 (Cal.); 249 Fed. 757 (Ga.). Rule 60: 227 Fed. 1008 (N. Y.); 229 Fed. 579 (Penn.); 245 Fed. 354 (Cal.). Rule 61: 245 Fed. 354 (Cal.). Rule 62: 204 Fed. 334 (N. Y.); 225 Fed. 883 (Penn.); 245 Fed. 354 (Cal.); 250 Fed. 798 (Cal.); 255 Fed. 560 (C. C. A., 8th Circ.). Rule 63: 203 Fed. 45 (C. C. A., 7th Circ.); 207 Fed. 848 (Wis.); 205 Fed. 983 (Iowa); 207 Fed. 848 (Wis.); 225 Fed. 883 (Penn.); 234 Fed. 949 (Penn.); 237 Fed. 380 (N. Y.); 238 Fed. 938 (Penn.); 244 Fed. 881 (Conn.); 255 Fed. 560 (C. C. A., 8th Circ.). Rule 66: 210 Fed. 389 (Wash.); 217 Fed. 736 (C. C. A., 8th Circ.); 225 Fed. 776 (N. Y.); 227 Fed. 325 (Mass.); 244 Fed. 838 (Texas); 245 Fed. 354 (Cal.); 253 Fed. 410 (Fla.); 258 Fed. 454 (Iowa). Rule 67: 228 Fed. 576 (Penn.); 245 Fed. 354 (Cal.); 247 Fed. 625 (C. C. A., 6th Circ.); 248 Fed. 508 (Mo.). Rule 68: 227 Fed. 1008 (N. Y.); 235 Fed. 1021 (Penn.); 245 Fed. 354 (Cal.); 252 Fed. 100 (C. C. A., 9th Circ.).

[76] 211 Fed. 544 (N. D. Ohio); 232 Fed. 619 (Cal.); 238 Fed. 441 (Mass.).

[77] 246 Fed. 834 (C. C. A., 2d Circ.); 271 Fed. 838 (C. C. A., 8th Circ.).

[78] 209 Fed. 938 (Penn.); 212 Fed. 143 (C. C. A., 3d Circ.); 228 Fed. 26 (C. C. A., 4th Circ.); 240 Fed. 256 (C. C. A., 1st Circ.); 244 Fed. 385 (C. C. A., 1st Circ.); 258 Fed. 346 (C. C. A., 8th Circ.); 259 Fed. 314 (Penn.); 266 Fed. 726 (Ala.).

Rules 75, 76, and 77, Record on Appeal — Reduction and Preparation — Correction of Admissions and Agreed Statements. — Perhaps none of the Federal Equity Rules has been more discussed, condemned, and praised than the rules relating to records on appeal.[79] In some cases the expense of reducing to narrative form or abstracting the record made in the trial court, and the inconvenience to court and counsel incident thereto, have resulted in the courts permitting the complete transcript in question and answer form to be used as the record on appeal. It is sometimes necessary to secure the approval of both the trial and appellate courts before this leave is granted. So far as can be ascertained, all courts agree that such matters as counsel for both parties find immaterial and inconsequential should be eliminated, and many of the trial judges approve, and some of the courts of appeals prefer appellate records containing the evidence in question and answer form.

The First, Second, Third, Seventh, Eighth and Ninth Circuit Courts of Appeals have allowed appellate records containing the evidence of witnesses in question and answer form, especially if they are not too voluminous, and some express a very decided preference for such a record. The Court of Appeals of the Sixth Circuit has condemned this practice, although it has approved some such records where both parties and the trial court agreed that there was a saving to litigants. Some district judges are of opinion that the narrative form should be used, and cite as reasons for it that the Court of Appeals is saved much labor thereby, and that more credit is given to the findings of the trial court when such form is used.

The opinions of those who believe that these rules relative to records on appeal should be either eliminated or radically changed are confirmed by what some judges and clerks of courts say concerning them.

---

[79] 208 Fed. 409 (C. C. A., 5th Circ.); 215 Fed. 95 (C. C. A., 7th Circ.); *In re* Equity Rule 75, 222 Fed. 884 (C. C. A., 6th Circ.); 208 Fed. 989 (C. C. A., 6th Circ.); 231 U. S. 703; 235 Fed. 891 (C. C. A., 6th Circ.); 235 U. S. 383; 238 U. S. 1; 240 U. S. 442; 230 Fed. 541 (Penn.); 233 Fed. 609 (C. C. A., 6th Circ.); 242 Fed. 267 (C. C. A., 6th Circ.); 250 Fed. 30 (C. C. A., 5th Circ.); 254 Fed. 522 (C. C. A., 9th Circ.); 258 Fed. 811 (C. C. A., 2d Circ.); 261 Fed. 170 (C. C. A., 6th Circ.); 269 Fed. 247 (C. C. A., 9th Circ.). Also many unreported decisions of judges.

Circuit Judge Mayer (New York):

"Equity Rule 75. The provision as to 'narrative form' is in my opinion undesirable. It puts an unnecessary and heavy burden upon counsel and where counsel do not agree, the court also is burdened in respect of a case the details of which may have escaped it. Thus, the court may be compelled to read part of the record in order to determine whether the narrative is correct or to determine whether the testimony shall be reproduced in the exact words of the witness. In the first place, the narrative form rarely, if ever, gives a true picture of the trial. Where a witness has been evasive, the exact reproduction of his testimony is the only method of displaying to the appellate court what occurred below and sometimes even that is not effective in a cold record. I am very strongly in favor of that part of the rule which provides for 'all parts not essential to the decision of the questions presented by the appeal being omitted.' This responsibility, however, should rest upon counsel and I think counsel are not sufficiently alive to this responsibility."

Judge Killits (Ohio):

"The rule requiring condensation of the record is, I think, a mistake. Often we spend an extraordinary amount of time in endeavoring to settle questions whether there has been a proper abstracting, and usually the matter comes at a time when the court is embarrassed by having failed to retain in mind the atmosphere of the case when on trial. It puts additional work on us and of course in the employment of attorneys and agents to do the abstracting and presentation of controversies to the court there must be additional expense, more than counterbalancing the expense of printing the enlarged record. . . . To put a second mind (that of the abstractor) between the witness and the reviewing judge doubles and more than doubles the chances for wrong impressions of the actual testimony."

Judge Morton (Massachusetts):

"Expressing my own views as to the abstracting of testimony, it does not work well. In the first place it is more expensive; the abstracting costs more than the printing of the complete record in most cases. I remember one case which took two or three days to hear in which the counsel quarreled over the condensation of the record. They must have taken much longer to settle the record than to try the case. It is quite true that question and answer testimony reproduces much better the attitude and meaning of the witness."

Arthur I. Charron (clerk of the Court of Appeals for the First Circuit):

"It is my belief that the judges in the appellate court much prefer the evidence presented in this form" (question and answer).

William Parkin (clerk of the Court of Appeals for the Second Circuit):

"From the outset the judges expressed a preference to have the records in equity cases come up in the form of question and answer. A stipulation is made by the parties that the record be so prepared and this stipulation is usually so ordered by the trial judge, though this formality is sometimes omitted."

Ex-Judge William L. Day (Ohio), in a paper before the American Bar Association,[80] well expresses the disadvantage of abstracting and filing appellate records in narrative form.

With evidence in question and answer form an appellate court has a much better picture of the trial, and the supreme and appellate courts frequently quote from such testimony in reviewing trial courts.[81]

In view of the added burdens and expense of abstracting records without compensating advantage, should not these rules be revised?

Rules 78, 79, 80, and 81. — These rules relate to an affirmation in lieu of an oath; additional rules to be made by the district courts in their respective districts for regulating practice not inconsistent with the Federal Equity Rules (which has been referred to heretofore); that when the time prescribed by these rules expires on Sunday or a legal holiday, such time shall extend to and include the next succeeding day. One is the rule relative to the time when these present rules became effective. They need no further comment.

Our Equity Rules on the whole are working well. The large number of judicial decisions enable lawyers to act with reasonable certainty under most of them.

---

[80] Vol. XLIII, AM. BAR ASS'N REP., 443, 446 (1918).

[81] N. Y. Scaffolding Co. *v.* Chain Belt Co., 245 Fed. 747 (C. C. A., 7th Circ.); s. c., 254 U. S. 32.

If any change or modification is contemplated, attention should be directed toward:

(a) Rule 25, Bill of complaint.
(b) Rule 26, Joinder of causes of action.
(c) Rule 30, Answer, Counterclaim.
(d) Rule 58, Interrogatories.
(e) Rules 59–68, Master proceedings.
(f) Rule 75, Appeal records.

The tremendous amount of time already consumed by court and counsel in interpreting and administering such of the rules as changed previous practice, makes it plain that innovations should be attempted only where a real necessity is manifest from experience over a considerable period of time.

If the Supreme Court would provide by rule some simple way of bringing before it, for interpretation or change, any rule over which there is a real difference of court opinion, or which is proving inefficient in operation, it would go a long way toward improving and unifying the practice under these Federal Equity Rules.

Wallace R. Lane.

CHICAGO, ILLINOIS.